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9	IN THE UNITED STATES DISTRICT COURT				
10	FOR THE NORTHERN DISTRICT OF CALIFORNIA				
11	TIMOTHY W. ARTHUR,) No.	C 13-1097 LHK (PR)	
12	Plaintiff,		ORDER DENYING M		
13	v.		DISMISS WITHO EJUDICE	OUT	
14	EDMUND G. BROWN, et al.,))		
15	Defendants.) (Do	(Docket Nos. 25, 44)		
16)			
17	Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42				
18	U.S.C. § 1983, alleging that defendants were deliberately indifferent to his serious medical				
19	needs. Defendants have filed two separate motions to dismiss for failure to exhaust, pursuant to				
20	Federal Rule of Civil Procedure 12(b). Although given an opportunity, plaintiff has not filed any				
21	opposition.				
22	The Ninth Circuit recently overruled Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.				
23	2003), which held that failure to exhaust available administrative remedies under the Prisoner				
24	Litigation Reform Act, 42 U.S.C. § 1997e(a) ("PLRA"), should be raised by a defendant as an				
25	unenumerated Rule 12(b) motion. <i>Albino v. Baca</i> , No. 10-55702, 2014 WL 1317141, at *1 (9th				
26	Cir. Apr. 3, 2014) (en banc). "[A] failure to exhaust is more appropriately handled under the				
27	framework of the existing rules than under an 'unenumerated' (that is, non-existent) rule." <i>Id</i> .				
28	Under the new law of the circuit, in the rare event that a failure to exhaust is clear on the				
	Order Denying Motions to Dismiss without Prejudice P:\PRO-SE\LHK\CR.13\Arthur097denalbino.wpd				

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1 face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Id. Otherwise, 2 defendants must produce evidence proving failure to exhaust in a motion for summary judgment 3 under Rule 56. Id. Defendants must present probative evidence that there was an available administrative remedy and that the prisoner did not exhaust that available administrative remedy. 4 5 *Id.* at *5, *8. 6 On April 14, 2014, defendants filed a notice and request to convert their Rule 12(b) 7 motions into motions for summary judgment. However, out of an abundance of caution, as a 8 matter of clarity, and to ensure that plaintiff understands the difference between a Rule 12(b) motion and a motion for summary judgment, defendants' request to convert their motions is DENIED. 10 11 In view of Albino, defendants' motions (docket nos. 25, 55) to dismiss plaintiff's instant prisoner action under the unenumerated portion of Rule 12(b) for failure to exhaust available 12 13 administrative remedies, as required by the PLRA, are DENIED. These denials are without 14 prejudice to defendants renewing their failure to exhaust defense in a motion for summary 15 judgment, if appropriate. 16 In order to expedite these proceedings, defendants must serve and file a motion for 17 summary judgment (whether or not they choose to raise a failure to exhaust defense) within 60 18 days of this order. Plaintiff must serve and file an opposition or statement of non-opposition to 19 the motion not more than 28 days after the motion is served and filed, and defendants must serve 20 and file a reply to an opposition not more than 14 days after the opposition is served and filed. 21 IT IS SO ORDERED. DATED: _ 5/2/14 22 23 United States District Judge 24 25 26

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